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IN THE
Supreme Court of the United States

JOHN A. RAPANOS, *et ux.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

JUNE CARABELL, *et al.*,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF PULTE HOMES, INC., CENTEX HOMES, HOVNANIAN ENTERPRISES, INC., KB HOME, LENNAR CORPORATION AND M.D.C. HOLDINGS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Clean Water Act's prohibition on unpermitted discharges to "navigable waters" extends to nonnavigable wetlands that do not abut a navigable water.

2. Whether the extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote, exceeds Congress' constitutional power to regulate commerce among the States.

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INTEREST OF *AMICI CURIAE*[1]

Amici Pulte Homes, Inc., Centex Homes, Hovnanian Enterprises, Inc., KB Home, Lennar Corporation, and M.D.C. Holdings, Inc. are among the ten largest publicly-traded residential homebuilders in the nation. *Amici* engage in residential construction and development on all scales, including the design of individual homes and the development of large-scale residential communities. In the year 2005 alone, *amici* together will sell more than 175,000 homes in 34 States and will employ over 58,000 workers.

Under the Clean Water Act ("CWA" or the "Act"), if *amici* engage in activities involving the movement of earth in federal "navigable waters"—rather than on land or in the waters of the States—they must first obtain a permit from the U.S. Army Corps of Engineers (the "Corps"). See 33 U.S.C. § 1344(a). Of course, nearly every construction project requires some degree of earthmoving. Accordingly, *amici* have a substantial interest in the establishment of proper and predictable boundaries to federal geographic jurisdiction under the CWA.

Amici are deeply concerned by the Government's claim that a mere "surface hydrological connection" to a down-gradient navigable water converts an inland geographic area into a "water of the United States." See Rapanos Opp. (I). Because all water flows downhill, the Government's position would federalize unlimited expanses of the national landscape. Indeed, in the cases under review, the Sixth Circuit approved agency determinations that upland ditches far afield from any traditional navigable water are "waters of the United States." See *Carabell* v. *United States Army Corps of Eng'rs*, 391

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for any party drafted this brief in whole or in part, and no persons or entities other than *amici* made any monetary contribution to its preparation or submission. Letters of consent have been filed with the Clerk.

F.3d 704, 705-06 (6th Cir. 2004) (authorizing jurisdiction over property next to an unnamed ditch that connects with an unnamed drain that in turn empties into Auvase Creek, which "eventually connects" with Lake St. Clair); *United States* v. *Rapanos*, 376 F.3d 629, 642 (6th Cir. 2004) (authorizing jurisdiction over wetland property next to a drain, which in turn connects to a creek, which in turn connects with a navigable river several miles away).

These far-reaching agency assertions of federal geographic jurisdiction are not unusual. They are not even the most extreme examples. By claiming that "tributaries" to navigable waters include upstream connections of the first, second and third order and beyond—including ditches, "intermittent streams" and "ephemeral streams" that only occasionally carry water—the Corps has characterized even arid desert areas as navigable waters of the United States. In one example in the western United States, the Corps asserted jurisdiction over an arid "desert wash" based on its "connection," through a 100-mile series of down-gradient washes and other tributaries, to the Colorado River, the only truly navigable water in Arizona.[2] In another example, the Corps required *amicus* Pulte Homes to endure a three-year permitting process for a town-approved residential community located 200 miles and three orders of "tributaries" away from that same river.

The practical effects of this broad claim of federal geographic jurisdiction are substantial. Once EPA or the Corps characterizes an upstream area as a "water of the United States," the agencies assert plenary jurisdiction over virtually every activity that takes place there, even if those activities would never cause a discharge to a downstream navigable water. In particular, before *amici* can move earth in an upstream "wetland," they must negotiate the Corps' complex

[2] *See Approved Jurisdictional Determination for the Sunrise Office Park*, No. 2001-00379-RJD, slip op. at 2-4 (U.S.A.C.E. Sept. 7, 2001) (administrative appeal decision), *available at* http://www.spd.usace.army.mil/cwpm/public/ops/regulatory/adminAppeals/AppealsTable.html.

permitting process, which includes a general "public interest" review rivaling that of any local planning board. According to one study, this process takes an average of 788 days to complete, at an average cost of over $270,000.[3] The Corps scrutinizes every aspect of an applicant's project in its review, and frequently requires extensive design changes and exacts costly "mitigation" projects and concessions as a condition of issuing a purportedly simple "discharge permit."

In short, the Government's position would extend federal regulatory authority far beyond the letter and intent of the CWA into the realm of state and local authority over land and water use, doing substantial harm to our system of federalism and at substantial practical cost to *amici* and countless others in their industry. This position is inconsistent with the CWA and with this Court's decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). It should be rejected; and the decisions below should be reversed.

SUMMARY OF ARGUMENT

The plain language of the CWA does not authorize the Corps to exercise geographic jurisdiction over an upland area merely because the area has a remote "hydrologic connection" to a navigable water. The CWA prohibits the discharge of pollutants into identifiable bodies of water: the "navigable waters," defined as "the waters of the United States, including the territorial seas." 33 U.S.C. §§ 1311, 1362(7). In invoking the "navigable waters" and the "waters of the United States," Congress employed terms of art that had been well-established in this Court's case law and in congressional legislation for centuries. See, *e.g.*, *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); 33 U.S.C. § 403. Thus, the plain language of the CWA demonstrates Congress' intent to exercise

[3] *See* David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetlands Permitting Process*, 42 Nat. Resources J. 59 (2002).

its "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. The Corps originally so interpreted the CWA in 1974, and this Court has held that this original interpretation correctly captured the intent of Congress. *Id.* at 168 (citing 33 C.F.R. § 209.120(d)(1) (1974)).

Because of the recognized difficulty of determining the boundaries of navigable water bodies, this Court has held that the Corps has the discretion to include within its jurisdiction wetlands directly abutting and "'inseparably bound up with the 'waters' of the United States.'" *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1984). But ambiguity regarding the demarcation of the metes and bounds of the "waters of the United States" does not alter the CWA's core limitation to identifiable navigable waters. The Government's "hydrological connection" theory, by contrast, would eliminate the distinction between the waters of the United States and the waters of the States.

The plain language of the CWA thus does not permit the Government's unlimited assertion of federal regulatory jurisdiction over practically every wetland and stream in the United States. Indeed, because the Government's interpretation pushes "the outer limits of Congress' power" and impinges on the States' traditional authority over land and water use, it cannot be sustained absent a clear statement by Congress. *SWANCC*, 531 U.S. at 172-74. No clear congressional statement authorizes the massive expansion of federal authority the Government asserts here. In fact, the Government's theories do not meet the basic prerequisites for judicial deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).

Finally, the Government's expansive definition of the "waters of the United States" is unnecessary to protect the Nation's navigable waters from upstream polluting activities. The CWA is far more naturally read to allow the agencies to regulate upstream *activities* that pollute federal waters than to

federalize upland *areas* that heretofore had been the exclusive domain of the States. As a matter of statutory language, the CWA grants the agencies authority to regulate "discharges" to the navigable waters, including "any addition of any pollutant to navigable waters." 33 U.S.C. §§ 1311, 1362(12). Thus, the agencies may regulate upstream discharges of pollutants to navigable waters, whether the pollutants reach the waters directly or through intervening conveyances. Moreover, as a matter of scientific necessity, the agencies have failed to explain how the upland deposit in the instant cases of "fill material"—generally consisting of rock, sand and gravel—risks transmitting that material to downstream "waters of the United States."

ARGUMENT

I. THE PLAIN LANGUAGE OF THE CWA CREATES FEDERAL GEOGRAPHIC JURISDICTION OVER SPECIFIC, IDENTIFIABLE BODIES OF WATER: THE "NAVIGABLE" "WATERS OF THE UNITED STATES."

"It is axiomatic that the starting point in every case involving construction of a statute is the language itself." *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) (internal quotations and alteration omitted). The plain language of the CWA bars the Government's sweeping assertion of jurisdiction here.

The CWA prohibits "the discharge of any pollutant by any person," except in accordance with a discharge permit. 33 U.S.C. § 1311(a). The "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). The Act further defines the "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

The CWA thus does not grant plenary jurisdiction over all the water in the Nation. To the contrary, the CWA grants ju-

risdiction only over specific "waters." *Id.* § 1362(7), (12).[4] The statutory touchstone for distinguishing jurisdictional "waters of the United States" from non-jurisdictional waters of the States is navigability. See *id.* § 1362(12). As this Court has observed, Congress' use of "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172.

This statutory language is "clear." *Id.* The terms "navigable waters" and "waters of the United States" are well-established terms of art developed through two centuries of case law and legislation, and Congress' use of these terms in the CWA confirms its intent to invoke its traditional jurisdiction over the navigable waters. Federal authority over the waters of the United States has long been understood to stem from the Commerce power over navigation. See, *e.g.*, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824). For the same reason, the concept of "navigability" has long been understood to define the geographic scope of federal authority. See, *e.g.*, *The Daniel Ball*, 77 U.S. at 563.

As originally understood in this Court's case law, the "navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States," are those that "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes

[4] *See Oxford English Dictionary* (2005) (defining "water" as a "[a] body of water on the surface of the earth"), *available at* http://dictionary.oed.com; *The American Heritage College Dictionary* 1524 (3d ed. 1997) (defining "water" as "[a] body of water such as a sea, lake, river, or stream"); *Webster's Third New International Dictionary of the English Language Unabridged* 2581 (Philip Babcock Gove et al. eds., 1993) (defining "water" as "a quantity or depth of water adequate for some purpose (as navigation)").

in which such commerce is conducted by water." *Id.* at 563. The distinction between the "navigable waters of the United States" and the "waters of the States" thus is based on "whether the stream in its ordinary condition affords a channel for useful commerce" among the States. *United States* v. *Donnelly*, 228 U.S. 243, 262 (1913). This Court has broadened the definition of "navigable waters" to include waters that were navigable in the past or through reasonable improvements could be made navigable in the future. See *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377 (1940); *Economy Light & Power Co.* v. *United States*, 256 U.S. 113 (1921). But the bedrock proposition that "[t]he states possess control of the waters within their borders" has not changed. *Appalachian Elec. Power Co.*, 311 U.S. at 405.

Congress has long respected the fundamental distinction between the navigable waters of the United States and the waters of the States. For example, in the Rivers and Harbors Act of 1890 ("RHA"), Congress prohibited the "creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the *waters of the United States*," or to "excavate or fill, or in any manner to alter . . . the course . . . or capacity of . . . the channel of any *navigable water of the United States*," without authorization from the predecessor to the Corps of Engineers. 33 U.S.C. § 403 (emphases added). The activities regulated by these two clauses of the RHA require different levels of authorization (congressional authorization for the complete obstruction of navigable waters, versus agency authorization for dredging, filling, or altering the channels of navigable waters). But for more than a century the geographic scope of the federally regulated navigable waters was the same.

When Congress uses a term of art, courts do not assume that its choice is haphazard or insignificant. Rather, courts presume that "Congress intended [the term] to have its established meaning." *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991). The terms of the CWA thus do not permit

the Government's "hydrological connection" theory, which would obliterate the distinction between the "waters of the United States" and the "waters of the States." Indeed, in *Leovy* v. *United States*, this Court rejected jury instructions that would have defined a "navigable water of the United States" as any navigable waterway "'*connected with* waters that permitted a journey to another state,'" because such a construction would draw the constitutionality of the RHA into question. 177 U.S. 621, 633 (1900) (emphasis added). According to this Court:

> If these instructions were correct, then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States. Nearly all the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one state, and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, the jury is informed, is sufficient to constitute a navigable water of the United States.

Id. For this reason—which applies with equal force here—this Court refused to "extend the paramount jurisdiction of the United States" under the RHA to "all the flowing waters in the states." *Id.*

The legislative history of the CWA confirms that Congress intended the concept of "navigability" to define the geographic scope of the waters of the United States. To be sure, Congress promulgated the CWA to remedy inadequacies in the prior application of the RHA as a pollution control statute. But Congress' actions must be placed in context. A major concern of Congress in 1972 was the Corps' reluctance to regulate beyond the "navigable in fact" waters and include those waters that could "reasonably be made" navigable.[5]

[5] *See, e.g.*, H.R. Rep. No. 92-1323, at 27 (1972) (stating that the Corps had "narrowly defined the waters to which these statutory provisions apply, and thus severely limited the scope of the law"); *id.* at 29-30 (noting that the language in the Corps' regulations was based on *The Daniel Ball*, but "more recent judicial opinions have substantially expanded that limited view of navigability" and citing *Appalachian Electric Power Co.* and *Economy Light & Power Co.*); *see also* H.R. Rep. No. 91-917, at 6-10 (1970) (observing that the Corps' permitting procedures did not adequately protect against the filling of substantial areas of submerged lands shoreward of harbor lines).

Thus, in the House, Representative Dingell explained that the CWA's definition was broader than "'navigable waters of the United States' in the technical sense," and should be "unencumbered by agency determinations which have been made or may be made for administrative purposes." 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 250-51 (Comm. Print, No. 93-1, 1973) ("*Leg. Hist.*"). Instead, citing *Appalachian Electric Power*, Representative Dingell explained that the CWA definition was intended to mirror

> more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the Daniel Ball case (77 U.S. 557, 563)—to include waterways which would be "susceptible of being used * * * with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera.

Id. at 250 (omission in original); see also *Riverside Bayview Homes*, 474 U.S. at 133 ("Congress evidently intended . . . to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.").[6]

In its own contemporaneous interpretation of the Act, the Corps followed Congress' instruction and interpreted the

[6] Senator Muskie, Senate floor manager for the conference bill, also explained that the conferees intended to define "navigable waters" to include "all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact." 1 *Leg. Hist.* at 178.

CWA to extend to the "navigable waters" not only as defined in *The Daniel Ball*, but also as expanded in *Appalachian Electric Power*. Thus, the Corps' 1974 regulations established the agency's jurisdiction under the CWA as extending to "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. § 209.120(d)(1) (1974); see also Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115, 12,115 (Apr. 3, 1974). The Corps noted that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor." 33 C.F.R. § 209.260(e)(1) (1974). As this Court later observed, there is "no persuasive evidence that the Corps mistook Congress' intent in 1974." *SWANCC*, 531 U.S. at 168.

II. THE CORPS' DISCRETION TO DEFINE THE METES AND BOUNDS OF THE NAVIGABLE WATERS DOES NOT EXTEND TO EVERY GEOGRAPHIC FEATURE WITH A "HYDROLOGICAL CONNECTION" TO A NAVIGABLE WATER.

Although the CWA by its terms invokes only the traditional federal jurisdiction over navigable waters, it is not "easy . . . to define the size and character of a stream which would place it within the category of 'navigable waters of the United States.'" *Leovy*, 177 U.S. at 632. Thus, as a practical matter,

> [i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Riverside Bayview Homes, 474 U.S. at 132. In *Riverside Bayview Homes*, this Court addressed an as-applied challenge to the Corps' assertion of jurisdiction over one such area—swampy marshland that abutted "the open waters of Black Creek, a navigable water of the United States." Reply Brief for the United States at 2, *United States* v. *Riverside Bayview Homes*, 474 U.S. 121 (1984) (No. 84-701). In that context this Court held that the Corps could reasonably conclude that wetlands directly abutting traditional navigable waters were "inseparably bound up with the 'waters' of the United States." *Riverside Bayview Homes*, 474 U.S. at 134.[7] This was particularly so in light of "Congress' unequivocal acquiescence to" the Corps' assertion of jurisdiction over wetlands in 1977. *SWANCC*, 531 U.S. at 167.[8]

The boundary demarcation problems that allowed the Corps to interpret the "waters of the United States" to include wetlands directly abutting a navigable water do not permit the Corps to eviscerate the plain text of the Act. See *id.* at 172. As the facts of these cases show, the Government's "hydrological connection" theory would claim jurisdiction far beyond the "navigable waters," over their primary tributaries, the tributaries to those tributaries, and so on up the chain to

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[7] Because *Riverside Bayview* involved a wetland that abutted a traditional navigable water, this Court did not directly address the other aspects of the Corps' regulatory definition of "waters of the United States." Instead, this Court's decision—like Congress' debate on the definition of "waters of the United States"—"centered largely on the issue of wetlands preservation." *Riverside Bayview Homes*, 474 U.S. at 136.

[8] Of course, Congress has not "unequivocally acquiesce[d]" to the Corps' "hydrological connection" theory. That theory has never been articulated in *any* regulation, and certainly was not included in the version of the regulations that existed before 1977.

the "highest reaches of the tributary system."[9] Moreover, the Government claims jurisdiction over wetlands "adjacent to" each of those links in the upstream chain, no matter how far those wetlands are from open, navigable waters. In short, the instant cases do not require this Court to establish definitively the boundaries of the bodies of the "navigable waters" the CWA unequivocally protects, because the upland ditches and wetlands at issue in these cases are a "far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends."[10] *Id.* at 173 (rejecting claim of jurisdiction over "ponds that are not adjacent to open water"[11]).

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[9] *See* Gary S. Guzy & Robert M. Anderson, Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters 6 (2001) (attempting to limit this Court's decision in *SWANCC* by asserting jurisdiction over "all tributaries to navigable waters or interstate waters, *upstream to the highest reaches of the tributary systems*") (emphasis added), *available at* http://www.saj.usace.army.mil/permit/documents/swancc.pdf.

[10] *Cf. SWANCC*, 531 U.S. at 171 (noting petitioner's position in that case that Congress authorized the inclusion of "waters adjacent to 'navigable waters,' such as nonnavigable tributaries and streams," but declining to rule on the point); *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003) ("The CWA . . . [is] not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters."). As set forth above, the Government's jurisdictional theory in these cases would go far beyond the primary tributaries and streams that are "truly adjacent to navigable waters," and extend federal jurisdiction "to the highest reaches of the tributary system."

[11] The term "open water" is frequently used to indicate water that actually is navigable. *See, e.g., United States* v. *Louisiana*, 363 U.S. 1, 79 (1960) ("Louisiana relies on a 1954 statute of its own establishing the State's boundary at three leagues seaward of the line between inland and open waters."); *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U.S. 552, 558 (1947) ("[V]essels approaching and leaving ports must be conducted from and to open waters by persons intimately familiar with the local waters.").

Before the Government may expand federal jurisdiction to the "highest reaches of the tributary system," it must show far more than a mere "surface hydrological connection" to a navigable water. Where, as here, "an administrative interpretation of a statute invokes the outer limits of Congress' power," the Government must show "a clear indication that Congress intended that result." *Id.* at 172. "This requirement stems from [a] prudential desire not to needlessly reach constitutional issues and [the] assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. The need for a clear congressional authorization "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* If no clear statement exists, the statute must be narrowly construed. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The Government's "hydrological connection" theory would create a massive federal encroachment upon areas traditionally within the domain of the States. Since the founding of the Republic, the States have enjoyed primary "control of the waters within their borders," subject only to the "jurisdiction of the United States under the constitution in regard to commerce and the navigation of the waters of rivers." *Appalachian Elec. Power Co.*, 311 U.S. at 405. This distinction between the "waters of the United States" and the "waters of the States" has long been respected. To eliminate this distinction—or, as the Government would prefer, to limit the "waters of the States" to those few ponds and hollows that are completely "isolated" from the tributary system—would "extend the paramount jurisdiction of the United States over all the flowing waters in the states," to the detriment of the long-standing authority of those States. *Leovy*, 177 U.S. at 162.

Moreover, the "dredge-and-fill" permitting program at issue in these cases regulates land and water use, and "[t]he

regulation of land use is traditionally a function performed by local governments." *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979). In its modern incarnation, the Corps' "dredge-and-fill" permitting process has little to do with the protection of navigation. Instead, the Corps' permit application process is essentially a system of land use regulation implemented by a federal agency. The Corps subjects each dredge-and-fill permit application to a plenary "public interest review," in which the Corps considers such general police power concerns as:

> conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.

33 C.F.R. § 320.4(a)(1).[12] As the Government concedes, the exercise of this authority "as a practical matter affect[s] activities (*e.g.*, residential housing development) that are also subject to extensive state regulation." Rapanos Opp. 25 (citation omitted).[13] These effects are substantial. If the Corps

[12] The Corps' "general permit" process—an ostensibly "streamlined" permitting process for smaller and simpler projects—also requires compliance with detailed requirements set forth in 70 pages of the Federal Register, including such land-use practices as the provision of vegetated buffer zones. *See* Issuance of Nationwide Permits; Notice, 67 Fed. Reg. 2020 (Jan. 15, 2002).

[13] In many States these activities are subject to extensive state *wetlands* regulation. *See, e.g.*, Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1995 (Jan. 15, 2003) ("*SWANCC* ANPRM") (observing that 15 States had enacted "isolated wetlands" regulatory programs prior to *SWANCC* and that additional States considered and adopted programs after *SWANCC*).

rejects a permit application, the project cannot go forward, regardless of the opinions of those state and local regulatory authorities. See *SWANCC*, 531 U.S. at 162-65 (addressing a project sponsored by 23 suburban Chicago cities and villages and approved by all necessary state and local authorities, but rejected by the Corps).

This Court has held that the Corps' expansive interpretation of its dredge-and-fill permitting program "imping[ed]" upon "the States' traditional and primary power over land and water use." *Id.* at 174. The CWA contains no clear statement authorizing the agencies to override this traditional balance and assert jurisdiction over all "hydrologically connected" areas "to the highest reaches of the tributary system." Instead, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use . . . of land and water resources.'" *Id.* at 166-67 (quoting 33 U.S.C. § 1251(b)).

Even apart from this "clear statement" rule, the agencies' "hydrological connection" theory is not entitled to ordinary deference under *Chevron*. The agencies' position simply lacks the "thoroughness," "validity," and "consistency" required to merit judicial deference. *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001). The agencies have not justified the need to regulate the deposit of "fill material" into remote areas far away from any navigable waters. Instead, the agencies' sole position since the passage of the Act has been the ceaseless aggrandizement of geographic jurisdiction.[14] Even post-*SWANCC*, after first conceding that the public interest required "clarifying what waters are subject to CWA jurisdiction and affording full protection to those waters through an appropriate focus of Federal and State re-

[14] *Cf. National Mining Ass'n* v. *United States Army Corps of Engr's*, 145 F.3d 1399, 1405 (D.C. Cir. 1998) (observing in reviewing the Corps' definition of "discharge of dredge and fill material" that the "overriding purpose" of the Corps' regulation "appear[ed] to be to expand the Corps' permitting authority").

sources," *SWANCC* ANPRM, 68 Fed. Reg. at 1991, the Government reversed course, announcing its intention to focus on "preserv[ing] the federal government's authority." Press Release, U.S. Army Corps of Eng'rs, EPA and Army Corps Issue Wetlands Decision (Dec. 16, 2003), *available at* http://www.usace.army.mil/inet/functions/cw/cecwo/reg/swancerelease.htm. This is not the sort of thorough or measured agency determination that deserves deference.

Finally, as the history of the *Rapanos* case vividly demonstrates, the CWA carries criminal penalties, which require the Act to be construed narrowly absent a clear statement to the contrary. *McNally* v. *United States*, 483 U.S. 350, 359-60 (1987). This is for good reason. The farther away from truly navigable waters the Corps asserts jurisdiction, the more likely it is that a homebuilder or contractor will fail to perceive the potential applicability of the Act and fail to obtain a permit to engage in, for example, "landclearing," "ditching," or "earth-moving." 33 C.F.R. § 323.2(d)(2)(i). This Court "should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations" in this manner. *Hanousek* v. *United States*, 528 U.S. 1102, 1003 (2000) (Thomas, J., with O'Connor, J., dissenting from denial of certiorari).

III. THE GOVERNMENT'S EXPANSIVE "HYDROLOGICAL CONNECTION" THEORY IS NOT NECESSARY TO PROTECT THE NAVIGABLE WATERS FROM UPSTREAM POLLUTING ACTIVITIES.

The Government's contortion of the language of the CWA and incursion into the traditional province of the States is particularly grievous because it is completely unnecessary. The agencies do not need to federalize broad swaths of the nation's landscape to protect the navigable waters from pollution from upstream discharges—as a matter of statutory interpretation or as a matter of basic science. The CWA is far

more naturally read to allow the agencies to regulate *activities* that pollute federal waters than to federalize the upland waters and wetlands that have long been the exclusive domain of the States.

Under the plain language of the CWA, the agencies have authority in appropriate cases over upstream activities that pollute the navigable waters, through their authority over the "discharge of any pollutant." 33 U.S.C. § 1311(a). If a discharge from an upstream point source will pollute the navigable waters and its control is "necessary to achieve Congressional goals in protecting navigable waters," Rapanos Opp. 22, the CWA provides the agencies the authority they require.[15]

The CWA creates two permitting schemes for discharges from a point source. Section 404(a) authorizes the Secretary of the Army (acting through the Corps) to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). This is the permitting scheme at issue in the instant cases. Section 402 authorizes EPA to issue permits for all other discharges of pollutants from point sources to navigable waters. See *id.* § 1342. These generally include discharges of the sorts of liquid pollutants and soluble chemicals that flow to navigable waters from an upstream source.

The agencies' approach to regulating these two types of pollutants through broad geographic interpretations of the

[15] In fact, EPA has purported to assert this authority in some cases by improperly attempting to regulate *entire construction sites* that it contends "may" lead to a discharge to the waters of the United States (as that term in turn is broadly defined by EPA and the Corps)—a jurisdictional approach that *amici* contest. This case does not present the question of the specific limits of EPA's authority under Section 402. For present purposes, it suffices to say that the statutory framework of the CWA allows the agencies to regulate discharges from point sources that flow downstream and pollute the navigable waters. *See In re Needham*, 354 F.3d at 346.

"waters of the United States" has led to an anomaly, which these cases vividly reflect. The activities regulated by the Corps under Section 404 of the Act—"dredge and fill" of earthen material—do not pose the same risks of downstream pollution as many of the activities regulated by EPA under Section 402. Thus, the Government's focus on the upstream *geographic* expansion of "waters of the United States"—as opposed to the regulation of upstream *activities*—has led the Corps to regulate the deposit of fill material in upland areas, which poses little or no risk of conveying pollutants to navigable waters. Refocusing the agencies' attention on the *activity* of a discharge—and away from plenary jurisdiction over practically all the waters and wetlands in the United States—would correct that incongruity.

The CWA provides the agencies the authority to address upstream activities that pollute downstream navigable waters. The statutory definition of "discharge of any pollutant" is broad. Congress defined the "discharge of any pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The fact that certain pollutants may not be discharged directly into the navigable waters, but instead flow through intermediate conveyances to the navigable waters, does not preclude EPA from addressing those discharges. See *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (holding that the term "discharge of a pollutant" "includes within its reach point sources that do not themselves generate pollutants" but simply "convey" pollutants to navigable waters). Thus, if a discharge from an upstream point source flows to a downstream navigable water and affects the "chemical, physical, and biological integrity of" that water, 33 U.S.C. § 1251(a), then the CWA makes clear that the offending "discharge of pollutants [can] be controlled at the source," through the issuance of an "NPDES" discharge permit or by penalizing the unpermitted polluter. *Riverside Bayview*

Homes, 474 U.S. at 133 (quoting S. Rep. No. 92-414, at 77 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742).[16]

In *In re Needham*, for example, the Fifth Circuit held that a discharge of oil into a non-navigable drainage ditch is regulable under the Oil Pollution Act of 1990,[17] because the residue of the spill entered Bayou Folse, which is "navigable-in-fact or adjacent to an open body of navigable water." 354 F.3d 340, 346 (5th Cir. 2003). Importantly, the court did not determine that the waterways between the discharge and Bayou Folse were themselves "waters of the United States." The fact that the ultimate receiving water was "adjacent to an open body of navigable water" was "sufficient to resolve th[e] matter." *Id.* at 345-36 & n.11.

Thus, the statutory definition of "discharge of a pollutant" allows EPA to address upstream polluting discharges without requiring the designation of the intervening areas as "navigable waters" or "waters of the United States"—which is the agencies' current approach. Given the existence of an obvious statutory solution, the agencies' approach treats the language of the CWA and the traditional prerogatives of the States far too casually.

Moreover, the agencies have provided no evidence that their approach is scientifically necessary. As a matter of basic physics, "dredge and fill material," such as rock, sand and

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[16] Under EPA's existing regulations, the "discharge of a pollutant" includes discharges through intermediate conveyances, including:

> additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works.

40 C.F.R. § 122.2.

[17] The Oil Pollution Act of 1990 regulates the discharge of oil into "navigable waters," defined (as in the CWA) as "the waters of the United States, including the territorial sea." 33 U.S.C. § 2701(21).

earth, behaves differently when deposited on the land and in water than do liquid and soluble pollutants. Because rock, sand and earth are made up of relatively large, heavy particles, they are not transported any appreciable distance downstream during ordinary water flows. See Wetland Sci. Applications, Inc., Dkt. No. OW-2002-0050-1835, *Technical Principles Related to Establishing the Limits of Jurisdiction for Section 404 of the Clean Water Act* 36, 40 (2003) ("*Technical Principles*"). See generally Luna B. Leopold, *A View of the River* 188-91 (1994) (describing the limited movement of large particles). For this reason, depositing "fill" material in an upland area—even an upland area that technically qualifies as a "wetland"—does not pose the same risk to downstream navigable waters as the upstream discharge of liquid chemical or oily materials.

As a result, the deposit of earthen material any appreciable distance from a navigable water poses little to no risk of polluting that water. See *Technical Principles* at 34, 62.[18] This is especially true in the dry and remote areas that the Government's "hydrological connection" theory would reach. Many of these remote channels, ditches and wetlands have no water in sight and are usually not recognizable as "waters" at all. For example, in the western United States, "[a]long the ephemeral streams which dominate the arid and semiarid landscape, transmission losses through seepage cause flood peaks and total discharge values to decline in the downstream direction. These losses are so great that eventually most flows decline to zero" before they ever reach a navigable water. William L. Graf, *Fluvial Processes in Dryland Rivers* 94 (1988); see also U.S. Army Corps of Eng'rs, *Final Summary Report: Guidelines for Jurisdictional Determinations for Waters of the United States in the Arid Southwest* 3 (2001) (noting that transmission losses of ephemeral streams in dryland areas "are so large that eventually most surface flows decline to zero"); *Technical Principles* at 62 (same).

[18] Accordingly, unlike in wetlands that "actually abut[]" navigable waters, the Corps cannot reasonably conclude that "in the majority of cases," the deposit of fill material in upland areas would "have significant effects on water quality and the aquatic ecosystem." *Riverside Bayview Homes*, 474 U.S. at 135 & n.9.

Thus, the Government is wrong to say that "'[a]ny pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves.'" Rapanos Opp. 12 (quoting *United States* v. *Deaton*, 332 F.3d 698, 707 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004)). Whatever the validity of that statement for the sorts of ambulatory pollutants regulated under Section 402, it is simply not true for the fill material regulated under Section 404. Perhaps this is why, in attempting to justify the constitutionality of its jurisdictional approach, the Government pays only lip service to the alleged "harm caused by . . . the release of sediment downstream." *Id.* at 24. The Government's primary argument (and the argument relied upon by the expert witness in the Rapanos case below) is that "the *filling* of wetlands . . . reduces or destroys their capacity to perform a variety of essential hydrological and ecological functions, such as filtering and absorbing pollutants from runoff and storing flood waters." *Id.* The plain language of the CWA does not authorize the Corps to regulate the mere "filling of wetlands," wherever they may be located. It authorizes the agencies to regulate "discharges" to the "waters of the United States."

CONCLUSION

For the foregoing reasons, this Court should reverse the judgments of the courts of appeals.

Respectfully submitted,

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